(13)

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
PETITIONER

v.

LTV CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Section 4047 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1347 (1982 & Supp. V 1987), authorizes the Pension Benefit Guaranty Corporation (PBGC) to "restore" a terminated pension plan to its pre-termination status, thus transferring the assets and liabilities of the plan back to the sponsoring employer, "in any such case in which the corporation determines such action to be appropriate and consistent with its duties." In this case, the PBGC restored pension plans sponsored by LTV Steel Company in part because LTV Steel, subsequent to the termination, adopted "follow-on" plans to provide benefits not covered by the termination insurance program. The PBGC determined that LTV Steel had abused the termination insurance program by shifting its liabilities to the PBGC while, in effect, continuing to operate the plans. The Second Circuit, which concluded that the PBGC had "focused inordinately on ERISA" (Pet. App. 17a) and had failed to take into account policies underlying bankruptcy and other labor laws, held, inter alia, that the PBGC erred in basing its restoration decision on LTV Steel's adoption of follow-on plans.

The United States will address the following question:

May the PBGC, in deciding whether to restore a terminated plan, take into consideration the sponsoring employer's adoption of an abusive follow-on plan?

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	12
Argument:	
The PBGC has reasonably concluded that restoration is warranted in response to the adoption of follow-on plans	14
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Bowman Transportation, Inc. v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281 (1974)	27
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962)	20-21
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	18
Columbia Packing Co. v. *PBGC*, 81 Bankr. 205 (D. Mass. 1988)	23
Independent U.S. Tanker Owners Committee v. *Lewis*, 690 F.2d 908 (D.C. Cir. 1982)	27
Murphy v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982)	15
Pacific Far East Line, Inc., In re, 713 F.2d 476 (9th Cir. 1983)	23
USWA v. *PBGC*, Bankr. No. 85-793 (Bankr. W.D. Pa. June 30, 1989)	16
United States v. *Morton*, 467 U.S. 822 (1984)	18
United States v. *Rutherford*, 442 U.S. 544 (1979)	20
United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968)	20
United States v. *Wise*, 370 U.S. 405 (1962)	20

Statutes: Page

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
- 5 U.S.C. 553 ... 26
- 5 U.S.C. 554(a) ... 26

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
- 11 U.S.C. 507(a)(1) ... 23
- 11 U.S.C. 507(a)(4) ... 23
- 11 U.S.C. 1113 ... 10

Employee Retirement Income Security Act of 1974:
- 29 U.S.C. 1001b (Supp. V 1987) ... 15
- 29 U.S.C. 1001b(c)(2) (Supp. V 1987) ... 17
- 29 U.S.C. 1001b(c)(4) (Supp. V 1987) ... 21
- 29 U.S.C. 1002(34) ... 2
- 29 U.S.C. 1002(35) ... 2
- 29 U.S.C. 1132(a)(2) ... 1
- 29 U.S.C. 1132(a)(5) ... 1
- 29 U.S.C. 1132(b) ... 1-2
- 29 U.S.C. 1301(a)(14) (Supp. V 1987) ... 5
- 29 U.S.C. 1302 ... 2, 21
- 29 U.S.C. 1302(a) ... 14
- 29 U.S.C. 1302(a)(1) ... 17
- 29 U.S.C. 1302(a)(2) ... 17
- 29 U.S.C. 1302(a)(3) ... 15, 17, 24
- 29 U.S.C. 1302(b)(1) ... 1
- 29 U.S.C. 1322(b)(3)(B) ... 4
- 29 U.S.C. 1322(c) (Supp. V 1987) ... 15
- 29 U.S.C. 1341 ... 7, 23-24
- 29 U.S.C. 1341(a)(3) (Supp. V 1987) ... 7, 21
- 29 U.S.C. 1341(b) (1982 & Supp. V 1987) ... 3
- 29 U.S.C. 1341(c) (1982 & Supp. V 1987) ... 4
- 29 U.S.C. 1341(c)(2)(B)(ii)(IV) (Supp. V 1987) ... 4, 21
- 29 U.S.C. 1342 ... 7, 23-24
- 29 U.S.C. 1342(a) (1982 & Supp. V 1987) ... 4, 22, 23
- 29 U.S.C. 1342(c) (1982 & Supp. V 1987) ... 4
- 29 U.S.C. 1347 (§ 4047) (1982 & Supp. V 1987) ... 5, 9, 12, 13, 14, 18, 19, 20

Statutes—Continued: Page

- 29 U.S.C. 1362 (1982 & Supp. V 1987) ... 5, 15
- 29 U.S.C. 1381 *et seq.* ... 3

National Labor Relations Act, 29 U.S.C. 158(e) ... 21

26 U.S.C. 412(d) (1982 & Supp. V 1987) ... 3

26 U.S.C. 4971 (1982 & Supp. V 1987) ... 2

Miscellaneous:

Chernoff, *Crushed by the Weight*, Pensions & Investment Age (Sept. 4, 1989) ... 17

133 Cong. Rec. (1987):
- p. S14,901 (daily ed. Oct. 22) ... 16
- pp. H11,969-H11,970 (daily ed. Dec. 21) ... 4, 22

135 Cong. Rec. H9453 (daily ed. Nov. 21, 1989) ... 17

Congressional Budget Office, *Federal Insurance of Private Pension Benefits* (Oct. 1987) ... 3

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974) ... 9, 20

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977) ... 23

H.R. Rep. No. 391, 100th Cong., 1st Sess., Pt. 1 (1987) ... 20

R. Ippolito, *The Economics of Pension Insurance* (1989) ... 5

3 L. King, *Collier on Bankruptcy* (15th ed. 1989) ... 23

PBGC Proposal to Initiate a Variable Rate Premium System; and Public Comments on Administration's Pension Plan Funding and Premium Rate Proposals: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 100th Cong., 1st Sess. (1987) ... 3

Pension Benefit Guaranty Corp., *Promises at Risk* (1987) ... 3, 4, 5, 16

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-390

PENSION BENEFIT GUARANTY CORPORATION, PETITIONER

v.

LTV CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves the termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation that has independent litigating authority (29 U.S.C. 1302(b)(1)), is primarily responsible for operating the termination insurance program. But the Department of Labor and the Treasury Department also have substantial interests in the operation of the program. Under 29 U.S.C. 1132(a)(2), the Secretary of Labor may bring suit to enforce the terms of employee benefit plans. See also 29 U.S.C. 1132(a)(5). Under 29

U.S.C. 1132(b), the Secretary of the Treasury and the Secretary of Labor have joint responsibility with respect to delinquent contribution actions against employers that have not fulfilled the minimum funding requirements established by ERISA. And under 26 U.S.C. 4971 (1982 & Supp. V 1987), the Secretary of the Treasury is responsible for imposing excise taxes on employers that do not fund their pension plans in accordance with ERISA's requirements.

In addition, the court of appeals held that since respondent LTV Corporation was seeking to reorganize, the PBGC should have tempered its efforts to protect the termination insurance fund in light of the policies underlying the Bankruptcy Code. That holding is of particular concern to the Federal Deposit Insurance Corporation, which frequently seeks to collect the assets of failed banks for the benefit of the federal deposit insurance fund.

STATEMENT

1. This case arises from the termination and subsequent restoration of three underfunded pension plans maintained by respondent LTV Steel Company. Defined benefit pension plans—the type involved here—are insured by petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation established by Title IV of ERISA. See 29 U.S.C. 1302.[1] Although Title I of ERISA requires employers to make regular contributions to defined benefit plans, a plan may become underfunded even if the employer is fulfilling its minimum funding obligations. For example, if pension benefits are increased as a result of collective bargaining, it might take some time for the plan's trust fund to provide for the increase in obligations. Plans may also become underfunded when an employer obtains a waiver from the Internal Revenue Serivce allowing it to amortize payments over a period of years rather than pay them immediately. See 26 U.S.C. 412(d) (1982 & Supp. V 1987). And, of course, plans may become underfunded when the amounts paid as benefits exceed the actuarial predictions, as can happen when financial difficulties cause the layoff of large numbers of employees eligible for pension benefits. See Pension Benefit Guaranty Corp., *Promises at Risk* 26-27 (1987), *reprinted in PBGC Proposal to Initiate a Variable Rate Premium System; and Public Comments on Administration's Pension Plan Funding and Premium Rate Proposals: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 34-35 (1987); Congressional Budget Office, *Federal Insurance of Private Pension Benefits* 12-15 (Oct. 1987).

Under ERISA's "standard termination" procedure (29 U.S.C. 1341(b) (1982 & Supp. V 1987)), an employer may terminate a plan if the plan has sufficient assets to cover its liabilities.[2] If, as here, a plan is underfunded, an employer may seek a "dis-

[1] Under defined benefit plans, retirees receive a fixed amount per month based on factors such as final salary and years of service. Such plans differ from defined contribution plans, under which employers typically contribute a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U.S.C. 1002(34) and (35). Insurance is not needed for defined contribution plans, since employees simply receive the money in their individual accounts. Insurance is needed for defined benefit plans, however, to ensure that funds are available to pay promised pensions.

[2] Special rules apply to multiemployer pension plans. See 29 U.S.C. 1381 *et seq.* The plans at issue here are single-employer plans.

tress termination" (29 U.S.C. 1341(c) (1982 & Supp. V 1987)), normally from a bankruptcy court. Such a "voluntary" distress termination is allowed if "the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, [the employer] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. 1341(c)(2)(B)(ii)(IV) (Supp. V 1987). Thus, a reorganizing company may terminate an underfunded plan only when the alternative is liquidation. 133 Cong. Rec. H11,969-H11,970 (daily ed. Dec. 21, 1987) (statement of Rep. Schulze).

An underfunded plan may also be terminated by the PBGC. Under 29 U.S.C. 1342(a) (1982 & Supp. V 1987), the PBGC may terminate a plan if, for example, it determines that the plan is seriously underfunded or that the possible long-run risk to the PBGC "may reasonably be expected to increase unreasonably if the plan is not terminated." If the PBGC's decision to terminate is contested, district court approval is required. 29 U.S.C. 1342(c) (1982 & Supp. 1987).

As a result of a termination, the PBGC becomes responsible for some, but not all, of the benefits due under the plan. The PBGC may not pay any beneficiary benefits of more than $750 per month in 1974 dollars—about $2,000 today (see *Promises at Risk*, *supra*, at 17)—even if an employee is entitled to greater benefits under the terms of a plan. 29 U.S.C. 1322(b)(3)(B). In addition, benefit increases resulting from plan amendments adopted within five years of the termination are not paid in full, and employees do not continue to accrue benefits under a plan once it is terminated. *Promises at Risk*, *supra*, at 17. These limitations operate as a form of coinsurance,

aligning the interests of employees with the PBGC and against termination. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989). The employer is not relieved of liability once it terminates a plan, since the PBGC may seek to recover from the employer (including members of its "controlled group" (see 29 U.S.C. 1301(a)(14) (Supp. V 1987)) pursuant to 29 U.S.C. 1362 (1982 & Supp. V 1987). However, the PBGC normally must stand in line with other creditors in a reorganization proceeding, and it has in the past averaged recovery of only eight cents on the dollar. *Promises at Risk*, *supra*, at 28.

Plans that have been terminated may be "restored" pursuant to Section 4047 of ERISA, 29 U.S.C. 1347 (1982 & Supp. V 1987). Section 4047 provides that, "[i]n the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status." The provision further states that the PBGC may "transfer to the employer * * * control of part or all of the remaining assets and liabilities of the plan." Thus, as a result of the restoration of a plan, the employer, rather than the PBGC, becomes responsible for the payment of benefits, and employees are entitled to all benefits due under the plan, not just the benefits insured by the PBGC.[3]

---

[3] Judicial approval is not required for a restoration decision to take effect, even though approval is usually necessary before an underfunded plan is terminated. The probable reason for the difference, as the district court noted, is that participants "may immediately experience cutbacks in their benefit payments" as the result of a termination, whereas

The PBGC has consistently made clear that it will restore a terminated plan if the employer creates an abusive "follow-on" plan. In three opinion letters, two in 1981 and one in 1986, it reiterated that "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. Accordingly, if an employer adopts a new plan that, "together with the guaranteed benefits paid by the PBGC under the terminated plan, provide for the payment of, accrual of, or eligibility for benefits that are substantially the same as those provided under the terminated plan" (J.A. 229), the PBGC views the plan as an attempt to shift liability to the termination insurance program while continuing to operate the plan.[4] In the PBGC's view, the termination insurance program should provide benefits only when plans have really been terminated.

"either no change or an increase in benefits" follows from restoration. Pet. App. 89a.

[4] Whether a new plan, together with the PBGC's payments, provides "substantially the same" benefits must be decided on a case-by-case basis. Some cases are easy, however: in one of the cases in which the PBGC concluded that a new plan was impermissible, the new plan expressly stated that it would provide 95% of the difference between the benefits promised under the terminated plan and the benefits paid by the PBGC. Pet. App. 176a. More generally, the PBGC "views a set of arrangements as substantially the same if it grants credit for purposes of benefit accrual, or for eligibility for certain types of benefits, for service rendered under the terminated plan or if it provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC because of the limitations set forth in Title IV of ERISA." J.A. 229. Thus, a new plan is considered to be an abusive follow-on plan if it is tailored to make up for the benefits lost as a result of termination. The PBGC would not consider it abusive if, for example, an employer created new defined contribution plans that did not differentiate among participants based upon their past service.

2. The LTV Corporation filed a reorganization petition in 1986. At that time, one of its subsidiaries, LTV Steel, operated three defined benefit pension plans that were underfunded by approximately $2.3 billion, including some $2.1 billion in insured benefits. See J.A. 138. LTV "readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. LTV Steel could not terminate the plans under Section 1341, however, because its collective bargaining agreement prohibited termination. 29 U.S.C. 1341 (a)(3) (Supp. V 1987). But after LTV informed the PBGC that it did not intend to make any further contributions to the already underfunded plans, the PBGC decided to terminate those plans under Section 1342. Pet, App. 41a. Since LTV Steel was not contributing to the plans, and since employees would continue to accrue benefits until the plans were terminated, delaying termination would have substantially increased the PBGC's potential liability. Moreover, LTV Steel had forecast that it might shut down some of its plants, and its collective bargaining agreement called for generous "shutdown benefits."[5] The PBGC would not be liable for the additional benefits if a shutdown occurred after termination of the plans, since it only pays benefits that have vested on the date of termination. The PBGC sought approval from the district court to terminate the plans and, with LTV's consent, the court approved the termina-

[5] LTV Steel had promised its employees that, in the event of a shutdown, they would immediately become eligible for pension benefits with no reduction to reflect that the benefits commenced prior to normal retirement age.

tion, making the PBGC the trustee of the plans. *Id.* at 42a.

The United Steelworkers of America (the Union), which had previously struck Wheeling-Pittsburgh Steel when it terminated its pension plans, threatened to strike unless its members received all the benefits due under the plans rather than the reduced benefits that would be paid by the PBGC. Pet. App. 43a. In June 1987, LTV Steel and the Union signed an agreement "which replaced most of the lost (*i.e.*, nonguaranteed) benefits to retirees and created new benefit programs for active workers." *Id.* at 44a. The program, including a similar program for salaried employees, would cost LTV Steel about $90 million annually. *Id.* at 47a.

The PBGC had previously advised LTV and the Union that it viewed the new arrangement as an abusive follow-on plan, and the PBGC's Executive Director testified to that effect in the bankruptcy court, but the bankruptcy court approved the agreement over the PBGC's objection in July 1987. Pet. App. 45a. The court noted that its action did not "preclude[] the PBGC from pursuing [other] options." J.A. 261. After meeting with LTV officials and offering to consider any information LTV wanted to provide, the PBGC concluded that LTV Steel's new plans were abusive. In reaching that conclusion, the PBGC noted, among other things, that "[o]ne component of the Follow-On Agreements, the Individual Account Trust ('IAT'), would, by its express terms, replace a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination. The IAT would provide up to 100 per cent of the difference and no less tha[n] 90 per cent of the amount not provided by PBGC." J.A. 234-235. The PBGC also concluded

that, at least for the foreseeable future, LTV Steel could afford to fund the terminated plans if they were restored.[6] In September 1987, the PBGC restored the three plans pursuant to Section 4047. Pet. App. 49a-50a.

3. LTV challenged the restoration decision, and the PBGC brought a federal court action to compel LTV Steel to comply with the decision. Pet. App. 51a-52a. The district court held the restoration decision unlawful. Although conceding that Section 4047 "contains little in the way of restrictive language" (Pet. App. 85a), the court held that the PBGC erred in considering the follow-on plans because "[t]he legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified only improvements in the financial condition of the plan and its sponsor as possible grounds for restoration" (*id.* at 93a-94a). The court also noted that the PBGC in 1987 had supported legislation that would have precluded employers from establishing follow-on plans, but Congress, in amending the Act, did not enact such a provision. *Id.* at 97a-99a.

The court then noted a further statement in the legislative history of Section 4047 that restoration is appropriate "if some other factor made termination no longer advisable." Pet. App. 100a (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974)). However, the court held, "the Record does not support a finding that the PBGC's determination that the 1987 CBA Plans were abusive 'represents a reasonable accommodation of conflicting policies' within Title IV and between Title IV and other non-

[6] The PBGC had concluded that restoration would increase LTV Steel's costs by about $120 million annually, and that LTV Steel, which had a cash flow of $265 million in 1988, could handle that increase. Pet. App. 114a.

ERISA laws." Pet. App. 100a. In its view, the three opinion letters the PBGC had issued relating to other follow-on plans were irrelevant because the terminations there at issue were "voluntary," whereas the termination here was "involuntary." *Id.* at 100a-101a. It also noted that, even though LTV Steel was seeking to reorganize, it was required by 11 U.S.C. 1113 to bargain with the Union about modifications of their collective bargaining agreement. Pet. App. 102a-104a. Although, as the court stated, it was not disputed "that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated," or that the new plans "substantially achieved that goal," the record, in the court's view, did not contain "any analysis by the PBGC of the differences, as opposed to the similarities, between the old and new plans." *Id.* at 109a.

Turning to the PBGC's contention that, in light of LTV Steel's improved financial condition, it could afford to fund the plans, the district court first stated that the record "belies the PBGC's contention that an alleged improvement in LTV Steel's financial [condition] was an important factor in the restoration." Pet. App. 110a n.36. It also questioned the PBGC's conclusion that LTV Steel could fund the plans, and held that the administrative record did not support that conclusion. *Id.* at 118a.

The district court also held that the PBGC's restoration procedures were inadequate. Although the court agreed with the PBGC that it had "acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding" (Pet. App. 124a), the court concluded that the PBGC had failed "to set forth those standards with

sufficient clarity to permit LTV to challenge them" (*id.* at 125a).

4. The court of appeals affirmed the district court's opinion in all relevant respects. Pet. App. 1a-27a. It introduced its discussion of the merits by stating that "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight" (*id.* at 16a), and by noting its conclusion that "a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other" (*id.* at 17a). "Rather," the court said, "PBGC focused inordinately on ERISA." *Ibid.* With respect to the PBGC's conclusion that "the adoption of the 1987 CBA Plans * * * constituted an abuse of the termination insurance program," the court determined that the PBGC could not take this factor into account because "[t]he legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration." *Ibid.* It noted, as the district court had, that Congress in 1987 failed to enact a proposal to outlaw follow-on plans, and stated that Congress's failure to do so "reflects the continuing consensus not to include the establishment of follow-ons as a basis for a restoration." *Id.* at 18a.[7]

Like the district court, the court of appeals found "problematic" the PBGC's conclusion that, "[b]ased on LTV's own cash flow projections, it appears that

[7] The court of appeals continued: "Not only is there no indication that the establishment of follow-ons is impermissible, but PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the 1987 CBA Plans were merely continuations of the old Plans." Pet. App. 19a.

the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation." Pet. App. 22a (brackets in original). It also agreed with the district court that the PBGC had followed inadequate procedures in restoring LTV Steel's plans. *Id.* at 26a.

SUMMARY OF ARGUMENT

Section 4047 does not itself set forth specific standards governing restoration of a pension plan, but instead authorizes the PBGC to determine when restoration is appropriate. Congress limited the PBGC's authority with respect to restoration only by directing it to act consistently with its duties under Title IV of ERISA. The PBGC did not abuse its broad discretion by determining that restoration is warranted in response to the adoption of follow-on plans.

One of the PBGC's duties under ERISA is to attempt to keep insurance premiums low. Follow-on plans subvert that goal. Employees and their unions, rather than vigorously opposing termination on the ground that benefits are likely to be reduced as a result, will not object if the employer promises to make up the difference. Employers in financial difficulty will therefore have a smoother road in attempting to shift their unfunded pension liabilities to the insurance fund, and if they succeed, premiums will inevitably rise. Such an increase in premiums may frustrate another purpose of Title IV by leading some employers to terminate their defined benefit pension plans in favor of other sorts of plans. And if solvent employers are dissuaded from sponsoring defined benefit plans, while insolvent employers are encouraged to terminate, the PBGC's financial perils can only increase. Finally, the PBGC's policy of prohibiting abusive follow-on plans serves still another of ERISA's purposes: by discouraging the termination of pension plans, it encourages the uninterrupted payment of full benefits.

The court of appeals never came to grips with the broad language of Section 4047. It focused instead on the legislative history—which noted that restoration would be warranted when an insolvent employer's financial condition improves—and concluded that Congress intended to authorize restoration only in that circumstance. That is clear error. It does not even comport with the legislative history, which stresses that restoration may be warranted in other circumstances. Nor is there merit to LTV's related contention that, as a practical matter, restoration is warranted only when an employer has fully recovered financially. The PBGC may reasonably conclude that, so long as immediate retermination is not likely, restoration is appropriate where an employer has attempted to shift its unfunded liabilities to the insurance fund while, in effect, continuing to operate its plans.

The court of appeals also erred by concluding that the PBGC had improperly focused on ERISA. Section 4047 directs the PBGC to determine whether restoration is appropriate in light of the purposes of ERISA, and does not direct it to consult the National Labor Relations Act or the Bankruptcy Code. Moreover, Congress has itself harmonized the three statutes by providing that pension plans should be terminated only as a matter of last resort. Specific provisions in ERISA require union approval prior to the termination of collectively bargained pension plans and direct bankruptcy courts to terminate plans only when necessary to prevent the liquidation of the sponsoring employer. The PBGC's position with re-

spect to follow-on plans, which discourages plan termination, is consistent with those provisions.

Finally, the court of appeals' conclusion that the PBGC erred in taking the follow-on plans into account in making the restoration decision infected its holding that the PBGC committed procedural error. With respect to the only two truly "procedural" errors asserted by the court below—lack of notice and opportunity for comment—there appears to be little warrant for the court's conclusion. In any event, to the extent that an issue of compliance with procedural requirements is raised, the cryptic opinion of the court below on that matter does not reveal the nature and bases of its conclusion with sufficient clarity to permit meaningful review by this Court.

ARGUMENT

THE PBGC HAS REASONABLY CONCLUDED THAT RESTORATION IS WARRANTED IN RESPONSE TO THE ADOPTION OF FOLLOW-ON PLANS

1. Section 4047 is a broad grant of authority to the PBGC. It provides that restoration is warranted in any case "in which the corporation determines such action to be appropriate and consistent with its duties" under ERISA. The only limit on the PBGC's authority is that the Corporation must determine that restoration is consistent with its duties "under this subchapter," *i.e.*, Title IV of ERISA. The purposes of Title IV are set forth in 29 U.S.C. 1302(a), where Congress provided that it intended "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants, (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out the obligations of this subchapter." See also 29 U.S.C. 1001b (Supp. V 1987). The PBGC's repeated determination that follow-on plans are abusive because "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program" (Pet. App. 162a, 167a, 173a) is consistent with its specific duties enumerated by ERISA.[8]

The PBGC's conclusion that the termination insurance program should provide benefits only when plans have really been terminated is virtually mandated by Congress's direction in Section 1302(a)(3) that the PBGC keep insurance premiums to a minimum. Those premiums have already increased dramatically over the last 15 years.[9] If employers in financial difficulty are able to transfer their unfunded liabilities to the PBGC and offer follow-on plans so that their employees do not object to plan termination, more employers will terminate pension plans

---

[8] While opposing follow-on plans, the PBGC has not objected to employees obtaining all the benefits promised by an employer who terminates an underfunded plan if the Corporation recovers in full the amount of the unfunded benefits it has guaranteed. In such a situation, the insurance fund is not subsidizing the provision of non-guaranteed benefits. In 1987, Congress dealt with this issue by enacting 29 U.S.C. 1322(c) (Supp. V 1987), which provides that a portion of the PBGC's recoveries under 29 U.S.C. 1362 (1982 & Supp. V 1987) and other recovery provisions is to be allocated to the payment of benefits not guaranteed by the Corporation. (For a case on this problem prior to the 1987 amendment, see *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), cert. denied, 454 U.S. 1142 (1982).)

[9] In 1974, the annual fee charged to employers was $1 per participant. The fee is now a variable rate of $16 to $50 per participant. See Pet. 4 n.4.

and the PBGC's deficit will increase. See pp. 22-24, *infra*. This case alone could add substantially to that deficit.[10]

Moreover, if follow-on plans are held to be permissible, other companies in financial trouble will likely follow LTV's lead, and terminate (or force the PBGC to terminate) plans with the understanding that they will provide lost benefits to their employees. As Senator Durenburger has stated, "it is no secret that other steel companies have considered following LTV's path, in an effort to resolve their pension liability responsibilities." 133 Cong. Rec. S14,901 (daily ed. Oct. 22, 1987). Wheeling-Pittsburgh Steel, which had terminated pension plans with unfunded liabilities of half a billion dollars, has already successfully relied on the decision below. *USWA* v. *PBGC*, Bankr. No. 85-793 (Bankr. W.D. Pa. June 30, 1989).[11] Thus, focusing on the steel industry alone, a decision invalidating the PBGC's policy against the institution of abusive follow-on plans could lead to a substantial increase in the PBGC's deficit. Unless general tax

[10] The PBGC's most recent annual report shows assets of $2.4 billion and liabilities of $4 billion, and thus a deficit of approximately $1.6 billion, not including this case. If the plans at issue are not restored, the PBGC will be responsible for additional unfunded liabilities of more than $2 billion. Although it would have a claim against LTV in the bankruptcy proceeding, the PBGC has in the past averaged recovery of only eight percent of employers' unfunded liabilities in such proceedings. *Promises at Risk, supra*, at 28.

[11] In an amicus brief urging the Court to review this case, five major domestic steel producers expressed the view that LTV Steel has obtained an unfair competitive advantage by transferring its unfunded pension liabilities to the insurance fund while they have continued to shoulder their responsibilities. Armco et al. Br. 11-13. If the decision below is upheld, some of those companies may follow LTV's lead.

revenues are used to bail out the PBGC, any effort to reduce that deficit would again require an increase in insurance premiums, contrary to the goal of Section 1302(a)(3).[12]

Large increases in premiums would, in turn, undermine the duty set out in Section 1302(a)(1)—encouraging the "continuation and maintenance" of defined benefit pension plans (the only type of pension plan governed by Title IV). See also 29 U.S.C. 1001b(c)(2) (Supp. V 1987) (stating that it is Congress's policy "to encourage the maintenance and growth of single-employer defined benefit pension plans"). One company, ACO, Inc., reported that the most recent increase in premiums led it to terminate its plan because it did not think it ought "to subsidize the poor funding practices of other companies." Chernoff, *Crushed by the Weight*, Pensions & Investment Age 1, 55 (Sept. 4, 1989). If such terminations by solvent companies become common, only ailing corporations anxious to shift their unfunded liabilities to the PBGC will want to sponsor defined benefit pension plans. Other companies will switch to, or institute, defined contribution plans.

The PBGC's determination that plans should be restored in response to the institution of abusive follow-on plans is also consistent with the purpose of Title IV of ERISA listed in Section 1302(a)(2): ensuring "the timely and uninterrupted payment of pension benefits." Since employers will not be able to use the insurance fund to subsidize ongoing benefit programs, the PBGC's restoration policy is likely to discourage the termination of pension plans. The policy therefore encourages the uninterrupted pay-

[12] Congress recently rejected a proposal to further increase insurance premiums. 135 Cong. Rec. H9453 (daily ed. Nov. 21, 1989).

ment of all benefits, including benefits the insurance program does not guarantee.

Thus, the PBGC's interpretation of Section 4047 is wholly consistent with the three stated objectives of Title IV, and should be sustained under any standard of review. In this case, moreover, the scope of the PBGC's discretion is especially broad, and the standard of review correspondingly narrow. Even when Congress has enumerated the circumstances in which a particular agency action is warranted, deference should be paid to the agency's reasonable interpretation of its organic statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Here, the circumstances in which restoration is appropriate have themselves been left for determination by the PBGC. Congress has provided in Section 4047 that restoration is warranted when "*the corporation* determines such action to be appropriate and consistent with its duties" (emphasis added).[13] The PBGC has not just been vested with authority to interpret a statutory provision setting forth the circumstances in which restoration is appropriate; it has been granted the very authority to make that determination. Accordingly, its decision that restoration is appropriate in cases where employers adopt abusive follow-on plans should not have been overturned.[14]

[13] The PBGC has therefore been given broader authority than that at issue in those cases where Congress explicitly delegates authority to construe a statute by regulation, and where the agency's interpretation is upheld unless it is " 'clearly inconsistent' with the statute or 'arbitrary'." *United States* v. *Morton*, 467 U.S. 822, 835-836 (1984).

[14] The courts below also erred in stating (Pet. App. 19a, 109a) that the PBGC did not adequately show that LTV Steel's follow-on plans substantially replaced the benefits lost as a result of the termination. It was "not disputed that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and that the new plans "substantially achieved that goal." *Id.* at 109a. Moreover, the administrative record showed that the follow-on plans "replace[d] a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination[,] * * * provid[ing] up to 100 per cent of the difference and no less than 90 per cent of the amount not provided by PBGC." J.A. 235. Thus, like the plans considered in the PBGC's opinion letters, LTV Steel's follow-on plans substantially replaced the benefits lost as a result of termination, and hence are abusive. In any event, the discussion of this point by the court of appeals was evidently not a basis for its judgment, since it concluded on other grounds that the character of *any* follow-on plans could not be considered by the PBGC.

2. Ignoring the broad statutory delegation of authority to the PBGC, the courts below focused instead on legislative history. They concluded that, in making restoration decisions, the PBGC may not consider the creation of abusive follow-on plans primarily because the legislative history of Section 4047 mentions financial recovery, but not follow-on plans, as a basis for restoration. Pet. App. 17a, 93a-94a. This approach cannot be squared with accepted principles of statutory construction—principles that are basic to the proper roles of Congress and the courts. The language of a statute—particularly language expressly granting an agency broad authority—is not modified by examples set forth in the legislative history. Examples, after all, are just that; they are illustrations of a statute's operation in practice, but they do not constitute definitive interpretations of the statute's scope. This is especially so where, as here, the relevant legislative history notes that, in addition to financial recovery, restoration would be appro-

priate "if some other factor made termination no longer advisable." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974).[15]

The courts below also concluded that the PBGC improperly failed to take into account statutes other than ERISA, namely the Bankruptcy Code and the National Labor Relations Act (NLRA). In so concluding, the courts again ignored the language of Section 4047. Congress explicitly directed the PBGC to take into account "its duties under this subchapter"—Title IV of ERISA—in making restoration decisions. Moreover, this is not a case where any particular provision of any other statute conflicts with the PBGC's actions.[16] Rather, the courts below

[15] The courts below erred in relying (Pet. App. 18a, 97a-99a) on the fact that in 1987 Congress considered, but did not enact, a provision that would have expressly authorized the PBGC to prohibit follow-on plans. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169-171 (1968). As this Court has stated, it is difficult to draw any conclusion from congressional inaction. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405, 411 (1962). That is particularly so here since Congress was aware of the action taken by the PBGC in this case at the time that it amended the statute: the Conference Report noted that LTV Steel's pension plans had been terminated and that "the PBGC recently took administrative action to restore three of those plans to their pre-termination status and require the LTV Corporation to continue operating those plans." H.R. Rep. No. 391, 100th Cong., 1st Sess., Pt. 1, at 106-107 (1987); see also *id.* at 178 (separate statement of Rep. Petri). Thus, although it was aware of the PBGC's rule that the adoption of follow-on plans was a ground for restoration, Congress did not amend Section 4047 to restrict the PBGC's discretion. The conclusion that Congress approved of the PBGC's rule is therefore at least as plausible as any other. Cf. *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

[16] Thus, LTV's reliance (Br. in Opp. 17) on *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174

thought that the PBGC erred by failing to give "due weight" to the "policies of bankruptcy and labor law." Pet. App. 16a. In these circumstances, the PBGC correctly based its analysis on the purposes of Title IV of ERISA as set forth in Section 1302.

Indeed, in Title IV of ERISA Congress has itself harmonized ERISA, the NLRA, and the Bankruptcy Code. With respect to the NLRA, Congress has provided that a company cannot voluntarily terminate its pension plan "if the termination would violate the terms and conditions of an existing collective bargaining agreement." 29 U.S.C. 1341(a)(3) (Supp. V 1987).[17] Thus, Congress has recognized an employer's obligation under the NLRA by providing that, in order to terminate a plan that was the product of collective bargaining, a company must obtain its union's permission. With respect to bankruptcy law, ERISA's termination provision states that a distress termination is available only if "the bankruptcy court (or other such appropriate court) determines that, unless the plan is terminated," the debtor "will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. 1341(c)(2)(B)(ii)(IV) (Supp. V 1987); see also 29 U.S.C. 1001b(c)(4) (Supp. V 1987) (stating that ERISA's policy is "to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in

(1962), and similar cases is misplaced. In *Burlington Truck Lines*, for example, the court directed the Interstate Commerce Commission to take into account the newly enacted "hot cargo" provision of the NLRA, 29 U.S.C. 158(e), in fashioning a remedy in favor of motor carriers injured when union members refused to handle certain "unfair goods."

[17] Section 1341(a)(3) (Supp. V 1987) makes clear that it does not limit the authority of the PBGC to terminate pension plans.

cases of severe hardship"). In other words, such a termination may be permitted only when necessary for an employer to stay in business. 133 Cong. Rec. H11,969-H11,970 (daily ed. Dec. 21, 1987) (statement of Rep. Schulze).

Since the insurance program does not cover all benefits, unions may be expected not to agree to the voluntary termination of a pension plan unless there is no other way to save the company. Bankruptcy courts should authorize distress terminations only in the same circumstance. And, under 29 U.S.C. 1342 (a) (1982 & Supp. V 1987), the PBGC will terminate a plan only as a last resort if necessary to protect the pension insurance program.

If abusive follow-on plans are allowed, Congress's scheme will be undermined since companies experiencing financial difficulties will find it much easier to terminate their pension plans. Rather than denying consent and threatening to strike over reduced benefits resulting from termination, unions will have little reason to withhold consent if the employer is allowed to make up lost benefits. And if a company cannot persuade a bankruptcy court to terminate a plan, even though it has the support of its union, it may be able to force the PBGC to terminate the plan by refusing to make contributions as they come due, thus increasing the amount of unfunded liabilities.[18]

[18] A statement in the court of appeals' opinion, if followed, would make it easier for employers to convince the PBGC to terminate plans "involuntarily." Specifically, the court noted its conclusion that "any claims arising out of LTV's obligation to pay into the pension plans are pre-petition debts" and thus are entitled to "no special priority." Pet. App. 23a-24a. If that is so, then employers in reorganization proceedings will be able to refuse to make their annual pension payments and the PBGC will be unlikely to obtain substantial recovery in the bankruptcy proceedings. Faced with mounting liabilities but little prospect of substantial recovery, the PBGC may decide that it is prudent not to allow benefits to continue to accrue. See 29 U.S.C. 1342(a) (1982 & Supp. V 1987).

We believe the court of appeals' statement is both potentially damaging to the termination insurance fund and incorrect as a matter of law. Like wages, pension obligations attributable to periods after a reorganization petition has been filed are administrative expenses entitled to the first priority under 11 U.S.C. 507(a)(1). Wages are entitled to first priority as an administrative expense because they must be paid in order to keep the reorganizing company in business (3 L. King, *Collier on Bankruptcy* ¶ 507.04, at 507-24 (15th ed. 1989)), and in enacting the Bankruptcy Code, Congress recognized that fringe benefit demands are often substituted for wage demands during collective bargaining. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 357 (1977). Contributions to pension plans are "analogous to wages in that the guarantee of future benefits is often considered by labor and management to be a form of present compensation" and therefore should also be given first priority. *Columbia Packing Co.* v. *PBGC*, 81 Bankr. 205, 208 (D. Mass. 1988); see also *In re Pacific Far East Line, Inc.*, 713 F.2d 476, 480 (9th Cir. 1983). In addition, the Bankruptcy Code provides that claims for contributions to pension plans "arising from services rendered within 180 days before the date of the filing of the petition" are entitled to fourth priority. 11 U.S.C. 507(a)(4). Thus, in the case of an employer who filed a reorganization petition in mid-1986, its 1987 payment to a pension plan would be entitled to first priority. Its 1986 payment, or portions of it, would have either first or fourth priority depending on whether it was attributable to the period after the filing of the reorganization petition or within 180 days before the filing of the petition. Delinquent contributions for prior periods—but only such contributions—would not be entitled to these priorities.

Thus, if follow-on plans are permitted, more companies in financial difficulty will find that they can transfer their unfunded pension liabilities to the insurance fund by promising to adopt such plans. Contrary to Congress's intent as expressed in Sections

1341 and 1342, employers will seek to terminate pension plans as a matter of first, rather than last, resort. And, as stated above (pp. 15-16, *supra*), insurance premiums will again rise, contrary to the goal of Section 1302(a)(3).

3. LTV erroneously suggests (Br. in Opp. 21 n.14) that an employer's adoption of an abusive follow-on plan is of little or no concern because, as a practical matter, the only question should be whether the employer can afford to fund the pension plans that were terminated. To be sure, an employer's financial situation may be relevant to any restoration decision. Thus, on the one hand, even though an employer had instituted an abusive follow-on plan, the PBGC would not engage in the futile and possibly counterproductive act of restoring a plan that was certain to be reterminated in the immediate future.[19] On the other hand, whether or not the employer had adopted an abusive follow-on plan, the PBGC would likely order restoration where a financial turnaround made it virtually certain that the employer could afford to fund the plan for the foreseeable future.

But many cases will fall between these extremes. For example, it may be clear that the employer can fund the plan for the near future while the plan's long-term prospects are less clear. In those cases, the PBGC may reasonably conclude that the findings justifying restoration ought to vary depending on whether the employer has adopted an abusive follow-on plan. Where an employer has adopted such a plan, the PBGC may order restoration if there is no significant chance of immediate retermination. In the absence of such abuse, however (or if the court below

[19] Here, for example, the PBGC did not restore a fourth plan because, among other things, it had insufficient assets to pay benefits then due. J.A. 316, 318.

is correct that abuse may not be taken into account), the PBGC might reasonably decide to require greater evidence of financial improvement.[20] Thus, contrary to LTV's contention, the existence of follow-on abuse, and the PBGC's authority to take it into consideration, may well be critical.[21]

4. LTV also noted, with respect to the court of appeals' brief discussion of the PBGC's procedures, that "[t]wo of the four failings list[ed] by the Court of Appeals [Pet. App. 26a]—the failure to employ 'ascertainable standards' or to provide 'a statement of its reasoning'—go to the substance of the administrative record rather than the procedures used to compile it." Br. in Opp. 25-26. We agree that those two alleged deficiencies, while labeled "procedural" by the court, are actually substantive. The PBGC issued a notice of restoration that explained its reasons for restoring the plans. Pet. App. 182a-183a. Two months earlier, the executive director of the PBGC had filed an affidavit in the bankruptcy court

[20] We leave to the PBGC discussion of the question of the appropriate standard for determining whether, in the absence of follow-on abuse, restoration is warranted on the basis of financial improvement.

[21] We believe the record in this case supports the PBGC's determination that restoration is appropriate because (a) LTV Steel has adopted abusive follow-on plans and (b) LTV Steel's financial condition poses little risk of immediate retermination. The plans have sufficient assets to pay benefits for several years. Pet. App. 116a-117a. In addition, LTV Steel paid $150 million for capital improvements and paid off $433 million in pre-petition bank debt in 1986 and 1987, and therefore could have made its pension contributions in those years. *Id.* at 112a. And its 1988 cash flow of $265 million was sufficient to cover the incremental cost of restoration, which the PBGC calculated to be $120 million. *Id.* at 114a. Furthermore, the prospects for the domestic steel industry have improved significantly.

explaining the PBGC's objections to the follow-on plans. J.A. 226-230. Her explanation referred to the three opinion letters in which the PBGC concluded that "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. Therefore, the court of appeals could not have meant that the PBGC had provided no reasons and had proceeded in accordance with no standards. Rather, as LTV recognized, the court's statement must reflect its conclusion that the PBGC's standards and reasons were defective.

Because the court of appeals' discussion of the procedural issue was so tied to its resolution of the substantive issues, it is unclear whether the court would have found the PBGC's procedures inadequate had it upheld its substantive determinations. In its one-page discussion of the procedural issue (Pet. App. 26a), the court did little more than identify (among the four alleged deficiencies) the two truly "procedural" defects it claimed to exist—that the PBGC had failed to give LTV either adequate notice of the material on which it was basing its decision or an opportunity to comment on that material—and it did not indicate whether and to what extent it gave them independent significance.[22] Nor did the court discuss the Administrative Procedure Act—which imposes no procedures for informal adjudication [23]—or otherwise explain the source of its notice and comment requirement.[24]

There is little basis for the court of appeals' conclusion that the PBGC did not provide an adequate opportunity for notice and comment. With respect to the PBGC's reliance on LTV Steel's adoption of abusive follow-on plans, LTV had notice that the PBGC objected to the plans. In fact, LTV had acknowledged that "[e]ight times the PBGC attempted without success in the Bankruptcy Court, in the District Court and in the Court of Appeals to stay approval and implementation of the collective bargaining agreement" on account of the follow-on plans. Br. in Opp. 8. Moreover, LTV and PBGC representatives met on a number of occasions and discussed the PBGC's objections to those plans. Pet. App. 126a. With respect to the PBGC's consideration of LTV

---

[22] The court said only that "[f]ailure to do any of these [four] things renders the decision arbitrary and capricious." Pet. App. 26a.

[23] The APA sets forth procedures for formal and informal rulemaking (5 U.S.C. 553) and formal adjudication, *i.e.*, "adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554(a)). An agency's governing statute may prescribe procedural requirements for informal adjudications, but Title IV of ERISA sets out no procedural requirements for restoration decisions.

[24] The court of appeals did rely on *Bowman Transportation, Inc.* v. *Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 288 n.4 (1974), a due process case. Pet. App. 26a. However, LTV did not suggest in the court of appeals that it had any property interest in not having its pension plans restored, and we doubt that it does. Rather, LTV argued that notice and comment are mandated by the judicial review provision of the APA. It argued, quoting *Independent U.S. Tanker Owners Committee* v. *Lewis*, 690 F.2d 908, 922-923 (D.C. Cir. 1982) (footnote omitted): "despite the Supreme Court's dictum in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, [435 U.S. 519 (1978)] that courts may not add to the procedural requirements of the APA except in "extremely rare" circumstances, we are justified in demanding some sort of procedures for notice, comment, and a statement of reasons as a necessary means of carrying out our responsibility for a thorough and searching review." LTV C.A. Br. 43.

Steel's financial situation, it is undisputed that the PGBC relied almost exclusively upon information that LTV had provided to the courts or to federal agencies, so LTV cannot be heard to challenge the accuracy of that information.[25]

* * * *

Both of the parties to this litigation and the courts below have regarded the question of the scope of the PBGC's restoration authority as the crux of this case. On that crucial question, the court of appeals erred in failing to recognize the importance of the PBGC's statutory authority to deter and to remedy follow-on abuse.

---

[25] If this Court believes there may be a question of compliance with any procedural requirements, we think it appropriate not to address that question now. The question whether any such requirements may or should be imposed in cases of informal adjudication not involving constitutionally protected interests is a novel and important one. In our view, it should not be reached until the court below has first had an opportunity to consider and explain, in the light of this Court's decision on the substantive issues, just what the nature and basis of its procedural holding is. Its present decision on that question is far too cryptic to permit meaningful review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

DECEMBER 1989

☆ U. S. GOVERNMENT PRINTING OFFICE: 1989 262203 650